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In the Supreme Court of the United States

OCTOBER TERM, 1931

CESARO SGRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

A statement by the District Court of its reasons for overruling one of the grounds upon which the validity of the search warrant was challenged will be found at R. 11. Its charge to the jury appears at R. 19–28. The judgment of the District Court was affirmed by the Circuit Court of Appeals *per curiam* without opinion. (R. 40.)

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 25, 1932. (R. 40–41). A petition for rehearing was denied February 9, 1932. (R. 47.) The petition for certiorari was filed May 6, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the search warrant issued upon probable cause.

2. Whether such warrant was executed within the time prescribed by law.

STATUTE INVOLVED

Section 11, Title XI, of the Act of June 15, 1917, c. 30, 40 Stat. 217, 229, commonly known as the Espionage Act (U. S. C., Title 18, Sec. 621), provides:

> A search warrant must be executed and returned to the judge or commissioner who issued it within ten days after its date; after the expiration of this time the warrant, unless executed, is void.

STATEMENT

In a criminal information filed in the District Court for the Northern District of New York the petitioner was charged, in the first count, with having possessed, and in the second count, with having sold, intoxicating liquor in violation of the National Prohibition Act. (R. 3–4.) Prior to trial he moved to suppress the evidence obtained in a search by Federal prohibition officers, pursuant to a search warrant, of premises operated by him as a hotel, on the ground,. among others, that the warrant was invalid because (1) it had issued without probable cause, and (2) it had not been executed within ten days of its issuance, as required by Section 11, Title XI, of the Act of June

15, 1917. (R. 9–15.) The motion was denied. (R. 15.) At the trial the case was submitted to the jury upon a stipulation of facts, subject to petitioner's objection, on the grounds stated in the motion to suppress, to the use of evidence obtained in the search and seizure. (R. 16–19.) The jury found petitioner guilty as charged in the possession count, but disagreed upon the sale count. Petitioner was sentenced to pay a fine of $500. (R. 28.) The judgment was affirmed by the Circuit Court of Appeals. (R. 40.)

ARGUMENT

I

THE SEARCH WARRANT ISSUED UPON PROBABLE CAUSE

The affidavit upon which the search warrant issued was made by one Charles G. Dodd, who was described therein as a United States Internal Revenue Agent, detailed to act as a "Prohibition Enforcement Agent." It contained the following recitals (R. 5–6):

> That on June 29, 1926, deponent personally purchased of a person in charge at said premises, a drink of intoxicating liquor, to wit: beer, containing more than one-half of one per cent. of alcohol by volume, for the sum of $10. That deponent tested the said beer which he took with him and same was found to contain 4.85% of alcohol by volume.

Petitioner asserts that the facts thus stated were insufficient to show probable cause for the issuance

of the warrant because they failed to show that the deponent was qualified to determine that what he had purchased was beer containing more than one-half of one per cent of alcohol by volume. This contention, we submit, is without merit.

An officer, charged with the enforcement of the National Prohibition Act who makes oath that he has tested and determined the alcoholic content of beer, must be understood to assert that he is able to make such tests. Moreover, while the affidavit did not specify the manner in which the test was made, it appears from the court's charge to the jury that Agent Dodd used an ebulliometer and that a Government chemist testified that this was one of the approved methods of determining the alcoholic content of liquids such as beer. (R. 22.) It is a matter of common knowledge, of which the commissioner issuing the warrant could take judicial notice, that with the use of an ebulliometer any person of ordinary intelligence can ascertain with approximate accuracy the percentage of alcohol contained in a fluid. Such instrument is in common use for testing the alcoholic content of the radiators of automobiles during freezing weather.

II

THE SEARCH WARRANT WAS EXECUTED WITHIN THE TIME PRESCRIBED BY LAW

With reference to the time which elapsed between the issuance and execution of the search warrant the following facts were stipulated (R. 17):

> That on or about the sixth day of July, 1926, William Arthur, United States Commissioner, at Rome, New York, issued a search warrant based upon an affidavit introduced in evidence in this case, of C. G. Dodd, in which Dodd swore that he made a purchase of beer of the defendant; that on the twenty-seventh day of July, 1926, the said search warrant not having been executed in the interim and ten days from the date of the search warrant having expired, the search warrant was taken by the prohibition agents to whom it was directed back to the commissioner and by him, or by some one in his office under his direction and control, the date of the search warrant was changed from July sixth to July twenty-seventh, 1926, and thus reissued; * * *

The record also contains the following certificate by the commissioner who issued the warrant (R. 7):

> I hereby certify that the complaint or affidavit, upon which the search warrant was issued in the above entitled matter, was made before me on the 6th day of July, 1926. That the search warrant was issued on or about said 6th day of July, 1926, but was not executed within the ten days prescribed by statute, and was returned to me by Albert Vandiver, Prohibition Agent in Charge of the Syracuse office requesting that same be reissued or redated, and my docket book shows that same was reissued on the 27th day of July, 1926, and mailed back to said Vandiver.

Petitioner's contention regarding the proceedings thus shown by the record is that, as the statute

(Sec. 11, Title XI, Act of June 15, 1917, *supra*, p. 2) declares that a search warrant which has not been executed within ten days after its date is void, the commissioner could not lawfully reissue the unexecuted warrant in this case after the lapse of that period. (Br. 20–22.)

While it is true that ten days after its original issue the warrant *as so issued* no longer had any legal effect, we know of no valid reason why the commissioner could not use it, as he could a printed blank or form, in making out *a new warrant*. As the new warrant could be based upon the same affidavit and would be identical with the first warrant except for the date, the act of the commissioner in changing the date and reissuing the warrant was, for all intents and purposes, the issuance of a new warrant.

CONCLUSION

The case was correctly decided below. It presents no question worthy of review by this Court. The petition should be denied.

Respectfully submitted.

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